Filed 2/23/05 In re Dominic T. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re DOMINIC T., JR., a Person Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY BUREAU OF CHILDREN AND FAMILY SERVICES, Petitioner and Respondent, v. LEACY U., Objector and Appellant.	A106291 (Contra Costa County Super. Ct. No. J0201348)

Appellant Leacy U. (mother) requests that we reverse the juvenile court's order terminating her parental rights to Dominic T., Jr. (Dominic), and remand this matter for further proceedings. Mother contends the Contra Costa County Bureau of Children and Family Services (respondent) did not comply with all of the notice requirements of the federal Indian Child Welfare Act (ICWA) after receiving information about Dominic's possible Cherokee heritage. Respondent contends that all required notice was given. We find that the required notice was not provided and remand for further proceedings consistent with this opinion.

BACKGROUND

We will only briefly summarize the proceedings below because mother's appeal raises only ICWA notice issues. On July 3, 2002, respondent filed a petition in juvenile court to have Dominic, then six months old, declared a dependent child of the court

pursuant to Welfare and Institutions Code section 300.[1] The petition alleged there was a substantial risk that Dominic would suffer serious physical harm or illness if left in the care of his parents, because the parents had a history of domestic violence and substance abuse problems. The proceedings ensued for the next twenty-one months.

The juvenile court took jurisdiction over Dominic and he was declared a dependent of the court on September 24, 2002. Although the court allowed mother custody of Dominic for a time after she had participated in rehabilitation services, the court removed the child from her custody after she apparently relapsed into substance abuse. On October 1, 2003, the court set the matter for a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26, without objections.

The first mention that Dominic might be of Cherokee heritage occurred on January 8, 2004, when, as described in respondent's report to the juvenile court pursuant to section 366.26, Dominic's paternal grandfather stated that his deceased wife, Dominic's paternal grandmother, "may have been part Cherokee." The grandfather agreed to contact other relatives to obtain more specific information. No further information was ever provided regarding the paternal grandmother's possible Cherokee heritage. In response to the paternal grandfather's statement, on January 14, 2004, respondent sent a "Notice of Involuntary Child Custody Proceeding Involving an Indian Child" (form SOC 319) to respondent of Bureau of Indian Affairs (BIA) indicating that Dominic's father's tribal affiliation was Cherokee, which notice was received by the BIA on January 16, 2004. When respondent informed the court of this development at the January 21, 2004, hearing, the court continued the hearing until March 3, 2004.

Sometime between the hearing and February 26, 2004, mother, contrary to a previous statement,[2] informed respondent for the first time that she too might be of

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[2] Respondent had reported to the court on September 24, 2002, that mother "was asked on July 31, 2002, about Indian ancestry and she reported none."

Native American ancestry. Mother also filed a petition for further reunification services pursuant to section 388. Respondent stated in its February 26, 2004, "Response to Mother's W&I 388 Petition" as follows:

"The mother says that he [Dominic's] maternal grandfather is Terry [M.] and that he reportedly has American Indian, Cherokee, heritage. However, the mother has provided her original birth certificate[3] and it does not show Terry [M.] listed as her father. The mother states that Terry [M.] proved he is her father through DNA testing, but did not provide documentation of such testing or findings. If the Cherokee Nation [of Oklahoma] decides to intervene, the mother would need to provide stronger documentation of her connection to the [M.] family than her birth certificate."

Respondent endeavored to send ICWA notices based on the mother's claim of Cherokee heritage. On March 1, 2004, respondent sent the BIA a "Request for Confirmation of Child's Status as Indian" (form SOC 318) stating this new information, which the record indicates was received by the BIA on March 3, 2004. Respondent appears[4] to have sent the BIA additional documents at the same time. These included a "Supplement to SOC 318 and SOC 319," which states that it is unknown if mother and Dominic's maternal grandfather, Terry M., were members of the Cherokee Nation of Oklahoma (Cherokee Nation), and that Dominic's maternal great grandfather, and his maternal great-great grandfather (all three men sharing the same last name), were members of the Cherokee Nation. Respondent appears to have also sent another "Notice of Involuntary Child Custody Proceeding Involving an Indian Child" which gave notice of the pending March 3, 2004 hearing, a birth certificate, a copy of the original petition

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[3] The certificate is not contained in the record.

[4] We say "appears" because the documentation is incomplete and contains significant errors. For example, the "Notice of Involuntary Child Custody Proceeding Involving Indian Child" is addressed to the BIA, but states that it is notice to "[t]he child's parent(s)." The proof of service accompanying this notice states that a "notice of hearing" was served on March 1, 2004, but indicates service to Dominic T.'s father only, lists no address, and does not list in the appropriate space that any documents other than this "notice of hearing" are being served.

that initiated the proceedings in 2002, and a copy of respondent's "Response to Mother's W&I 388 Petition," dated February 26, 2004.

On March 1, 2004, respondent also appears to have sent to the Cherokee Nation copies of all of the documents it sent on that same date to the BIA except for its "Response to Mother's W&I 388 Petition."[5] This is the first and only indication that notice was sent to the Cherokee Nation contained in the record.[6] Respondent did not address the documents or mailing to any individual at the Cherokee Nation. The form SOC 319 notice refers to the upcoming March 3, 2004 hearing, but was not received by the Cherokee Nation until two days after this hearing, on March 5, 2004.

At the March 3, 2004 hearing, the juvenile court was informed of the mother's claim and the notices sent. The court continued matters until March 26, 2004, to allow notice in compliance with ICWA, at which time it would hold the section 366.26 hearing and consider the mother's section 388 petition.

Sometime on or after March 4, 2004, respondent received a letter from the BIA which stated that there was insufficient information on Dominic's maternal side to identify a federally recognized tribe, and noting that "alleged paternity" is unacceptable for ICWA applicability. The BIA included, circled with a question mark, the portion of

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[5] We again use the term "appears" because of the incomplete and erroneously stated documents. The proof of service accompanying the form SOC 319 notice again states the person served is Dominic's father, although the Oklahoma address listed appears to be for the Cherokee Nation. Once more, the proof of service does not list in the appropriate space that any other documents other than the notice are being served. Moreover, the proof of service, purportedly made under penalty of perjury by the stated declarant, respondent's social worker Paula Hollowell, is not in proper form for a declaration made under penalty of perjury because it is not signed by the stated declarant, Hollowell, but by another person "for" Hollowell. (Code Civ. Proc., § 2015.5.)

[6] In a March 11, 2004 letter to the Cherokee Nation, Hollowell states that she had previously sent certain documents to the Cherokee Nation on February 6, 2004. These are not contained in the record and respondent does not argue on appeal that notice was effected on that date.

respondent's February 26, 2004 response to mother's petition that is quoted above regarding Terry M.'s alleged paternity.

Respondent did not reply to the BIA. Instead, Hollowell sent a letter, dated March 11, 2004, to the Cherokee Nation stating that Terry M. was not listed on mother's birth certificate as her father, even though the mother and Terry M. had the same last name, and that mother had been asked for documentation to show that Terry M. was, in fact, her father. The record does not indicate the method by which Hollowell sent this letter, e.g., by regular mail, certified mail, fax, etc.

Hollowell sent a second letter to the Cherokee Nation on March 19, 2004, although the record again does not indicate the method of delivery. Among other things, Hollowell states that mother's uncle "is reportedly enrolled in the Cherokee Nation" without providing further details. She also reports that the court previously had found Terry M. to be mother's "legal father" during her own dependency proceedings in 1988, and attaches a 1988 Contra Costa County Social Service Department report to the court. The 1988 report states in relevant part as follows:

"The minors' legal father, [Terry M.], currently is facing criminal charges regarding physical abuse of Leacy in January 1986. . . . [¶] According to Ms. M. [referring to the grandmother of Dominic], the putative father of Leacy, Timothy H., does not maintain contact or support the minor. . . . (It needs to be noted that there has been much discussion regarding who the biological father of each of the children is. There apparently has been no medical test to verify one father over another. Previously, in this Court, [Terry M.] was given standing as the legal father.)"

The 1988 report further indicates that the mother was born in June, 1980, approximately five months after the mother and Terry M. were married, and was given both Timothy H.'s and Terry M.'s last names.

Hollowell also states in her March 19, 2004 letter to the Cherokee Nation that "[o]ur next Court hearing will take place on March 26, 2004," without further elaboration. She also prepared a report to the juvenile court that same day, in which she

recites her ICWA notice efforts and explains the issues regarding Terry M.'s possible paternity of mother as stated in the 1988 report to the court quoted above.

At the March 26, 2004 hearing, respondent reported to the court about its ICWA notice efforts, which were introduced together in one exhibit and admitted into evidence without objection. The court heard Hollowell's short, general testimony confirming that she had prepared and sent the documents in the exhibit. The court indicated that it had reviewed the exhibit and respondent's March 19, 2004 report to the court, then invited further comments and information from all the parties and, after none was offered, stated: "[T]hen the Court finds that the [ICWA] does not apply in this case to this child, but that notice has been given as required by law." Following respondent's recommendations, the court then found that Dominic was adoptable and terminated parental rights. Mother filed a timely notice of appeal on April 7, 2004.

DISCUSSION

Mother contends respondent failed to comply with ICWA's notice provisions because respondent (1) did not provide sufficient notice of scheduled hearings by its March 1, 2004 notice and March 11 and 19, 2004 letters to the Cherokee Nation, and also should have sent these documents to two other federally recognized Cherokee tribes; (2) should have responded to the BIA after receiving the BIA's March 4, 2004 letter; (3) should have provided the name or other identifying information for mother's uncle to the appropriate entity; and (4) while contacting the BIA initially, failed at that time to notify any Cherokee tribe, even though the Cherokee tribe was identified as Dominic's tribal affiliation. We accept for sake of argument that these asserted defects, lest they defeat the rights of Indian tribes not at fault for them, are not waived by the parents' failures to raise them anytime below. (*In re Samuel P.* (2004) 99 Cal.App.4th 1259, 1267-1268.)

"The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource. [Citation.] Congress has concluded the state courts have not protected these interests and drafted a statutory scheme intended to afford needed

protection. (25 U.S.C. § 1902.) The courts of this state must yield to governing federal law." (*In re Desiree F.* (2004) 83 Cal.App.4th 460, 469 (*Desiree*).)

ICWA requires notice be given of certain proceedings, which the parties concede include the proceedings involved here, when they involve an "Indian child." It defines an "Indian child" as a child "who is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the *biological* child of a member of an Indian tribe." (25 U.S.C. §1903(4), italics added; see also Cal. Rules of Court, rule 1439,[7] as amended effective Jan. 1, 2001 (rule 1439(a)(1).)[8] "Determination of tribal membership or eligibility for membership is made exclusively by the tribe." (Rule 1439(g); see also *In re Levi U.* (2000) 78 Cal.App.4th 191, 198.)

When an Indian child is involved in relevant proceedings, notice of the proceedings is required as stated in title 25 United States Code section 1912(a): "If any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent of Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary."

"[Rule 1439] implements ICWA's notice provisions in California courts." (*In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 941-942.) At the time of the proceedings below,

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[7] All references to rules are to the California Rules of Court.

[8] Rule 1439 were revised in part as of January 1, 2005. Our discussion of rule 1439 refers to its language as of the time of the proceedings below. On remand, the court will of course be required to ensure compliance with the present version of rule 1439.

rule 1439 provided that "if . . . the court *has reason to know the child may be an Indian child*, the court *shall* proceed as if the child is an Indian child . . . ." (Rule 1439(e), italics added.) It further provided that the court has reason to know the child may be an Indian child if, among other things, "a party . . . informs the court or the welfare agency or *provides information suggesting* that the child is an Indian child . . . ." (Rule 1439(d)(2)(A), italics added.) "Proceedings" includes "hearings affecting the status of an Indian child," including section 366.26 hearings. (Cal. Rules of Court, rule 1439(b).)

Rule 1439(f), spelled out specifically how to provide effective notice. It stated in relevant part that parents and a child's tribe must be notified of a pending petition and the right of the tribe to intervene in the proceedings, and continued, "If at any time after the filing of the petition the court knows or *has reason to know* that the child is or *may be* an Indian child, the following notice procedures *must* be followed:

"(1) Notice *must* be sent by registered or certified mail with return receipt requested . . .

"(2) Notice to the tribe *shall be to the tribal chairman unless the tribe has designated another agent for service.*

"(3) Notice shall be sent to all tribes of which the child *may* be a member or eligible for membership.

"(4) *If the identity or location of . . . the tribe cannot be determined*, notice shall be sent to the specified office of the Secretary of the Interior, which has 15 days to provide notice as required.

"(5) Notice shall be sent *whenever there is reason to believe* the child *may be* an Indian child, *and for every hearing thereafter unless and until it is determined that the child is not an Indian child.*" (Italics added.)

Moreover, rule 1439(h) states that "[i]f it is determined that the [ICWA] applies, the juvenile court hearing shall not proceed until at least 10 days after those entitled to notice under the [ICWA] have received notice."

"Failure to comply with the ICWA notice requirements is prejudicial error unless the Indian tribe has participated in or has stated it has no interest in the dependency

proceedings." (*In re H.A*. (2002) 103 Cal.App.4th 1206, 1213.) However, "[d]eficient notice under the ICWA is . . . not invariably so." (*In re Antoinette S*. (2002) 104 Cal.App.4th 1401, 1411.) In rare cases, inadequate notice may be harmless. (*Ibid.*)

"The superior court has a sua sponte duty to assure compliance with the notice requirements of the ICWA." (*In re H.A., supra*, 103 Cal.App.4th at p. 1211.) To assist the juvenile court and to provide an adequate record on appeal, the moving party should file with the court a photocopy of the notice, the return receipts, and any correspondence received from the Indian tribe or the Secretary of the Interior.[9] (*Id.* at p. 1215; *In re Asia* (2003) 107 Cal.App.4th 498, 508.) A social service agency who fails to file such papers with the court in termination of parental rights proceedings faces the "strong likelihood of reversal on appeal." (*In re H.A., supra,* at p. 1214.)

The juvenile court's finding that ICWA did not apply, but that ICWA notice nonetheless was provided as required by law, is plainly incorrect with regard to Dominic's possible maternal Cherokee Nation heritage.[10] Respondent was required to give notice to the Cherokee Nation of the March 26, 2004 hearing, because respondent had "reason to know" and "reason to believe" Dominic "may be" an Indian child. Rule 1439(g)(5).) The record contains only one "notification" regarding the May 26, 2004 hearing, contained in Hollowell's March 19, 2004 letter to the Cherokee Nation.[11] This

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[9] Rule 1439, as recently amended, now requires filings of such documents with the court.

[10] The information before the court regarding attempted notice and Dominic's claimed Cherokee heritage is not in dispute. Our issues regarding the trial court's findings related to this information are questions of interpretation regarding the notice provisions contained in ICWA and rule 1439. Accordingly, we conduct an independent review of the court's findings regarding this information. (*In re Dwayne P.* (2002) 103 Cal.App.4th 247, 254.)

[11] As indicated by our previous footnotes in the background section of this opinion, even respondent's prior notices sent by certified mail, return receipt requested, were deficient in numerous respects, including the incomplete and/or incorrect information stated on the forms and proofs of service, and respondent's failure to address the forms to the tribal chairman of the Cherokee Nation. Recent cases have pointed out deficiencies in both

"notification" was insufficient for numerous reasons, including that there is no evidence that the letter was sent to the Cherokee Nation by certified or registered mail, return receipt requested (rule 1439 (f)(1)), or that it was sent to the Cherokee Nation's tribal chairman or other designated agent for service (rule 1439(f)(2); see also *In re Asia L., supra,* 107 Cal.App.4th at p. 509 [reversing in part for failure to comply with rule 1439's requirement that notice be sent specifically to the tribal chairman].)

Moreover, the court should not have proceeded with the March 26, 2004 hearing even if notice had been properly effected on March 19, 2004. The court was not supposed to proceed with any hearing until at least 10 days after such notice was received by the Cherokee Nation, given that ICWA did apply here. (Rule 1439(h).)

The juvenile court did not explain its finding that ICWA did not apply to this child. We assume the court made this finding regarding mother's information (versus the paternal grandfather's statement in January 2004) based on the one issue respondent raised to the court about it, that being that Terry M.'s *biological* relationship to Dominic was not clearly established by the information respondent had obtained.

As we have discussed above, respondent reported certain undisputed facts, including that Terry M. was not listed as the father on mother's birth certificate; that mother claimed Terry M. had established his biological paternity by DNA testing; and that a 1988 social service agency report in a prior court proceeding stated that Terry M. has been declared mother's legal father, and indicated that he had claimed to be the biological father, mother had been given his last name and the last name of another man referred to as mother's "putative father," and mother was born to Terry M.'s wife approximately six months after they were married. We agree that these facts indicate that Dominic's status as an "Indian child" is "less than certain" based on the genealogy of his maternal grandfather, Terry M. That, however, should not be respondent's or the court's

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forms. (See *In re C.D.* (2003) 110 Cal.App.4th 214, 225-226; *In re H.A., supra,* 103 Cal.App.4th 1206.) We do not further address these deficiencies, however, in light of respondent's failure to provide the requisite notice of the March 26, 2004 hearing.

concern for the purposes of notice in light of the language in rule 1439, which indicated that ICWA's notice provisions should be applied whenever information exists "suggesting," giving "reason to know," and "reason to believe" that the child "may be" an Indian child. (See *In re Dwayne P.* (2002) 103 Cal.App.4th 247, 254 (*Dwayne P.*) [finding reversible error for failure to comply with ICWA notice provisions].)

Dwayne P., supra, 103 Cal.App.4th 247, is most instructive here. Dwayne P.'s two sons were the subject of proceedings pursuant to section 300 that required ICWA notice if information was known that the sons possibly were of Indian heritage. In the course of the proceedings, Dwayne P. reported that he "may have Cherokee Indian heritage" and his wife indicated through counsel that she had some heritage, although she did not know the extent of it or whether she was eligible for tribal membership. (*Dwayne P., supra,* at p. 252.) The appellate court disagreed with the trial court's determination that ICWA's notice provisions did not apply, given these statements. Although the parents were uncertain of their status and did not make an evidentiary showing regarding their heritage, the appellate court found that nothing more was needed, as there was a substantial difference "between a showing that may establish a child is an Indian child within the meaning of the ICWA and the minimal showing required to trigger the statutory notice provisions." (*Id*. at p. 254.)

The information available to respondent here regarding Dominic's possible Cherokee Nation heritage is greater than that contained in the parent's statements in *Dwayne P., supra*, 103 Cal.App.4th 247. Respondent was given information that two specific individuals, Terry M.'s father and grandfather, had been members of a specific tribe, the Cherokee Nation. While questions existed about Terry M.'s biological paternity, respondent was told that he had taken a DNA test confirming he was mother's biological father and had a court report indicating he had claimed her as his biological child and was found to be her legal father years ago. Under the minimal standards for information triggering notice pursuant to rule 1439, this was sufficient to give "reason to believe" that Dominic "may" be an Indian child. Accordingly, the juvenile court erred in finding that ICWA did not apply to Dominic for purposes of notice, and that ICWA's

notice had been effected for the March 26, 2004 hearing. We must conclude that this error is prejudicial because nothing in the record indicates that the Cherokee Nation "has participated in or expressly indicated no interest in the proceedings." (*In re H.A, supra*, 103 Cal.App.4th at p. 1213.)

Appellant also contends that respondent, rather than merely sending notice based upon Dominic's maternal heritage to the Cherokee Nation only, should have responded to the BIA's March 3, 2004 correspondence, indicating the BIA thought that there was insufficient information to establish Terry M.'s alleged paternity. Both contentions are plainly incorrect. Rule 1439(f)(3) and 4, require notice be sent to all tribes to which a child may be a member and, if the location of those tribes cannot be ascertained, sent to the Secretary of the Interior. The record indicates that the only information that respondent had about Dominic's maternal Indian heritage related specifically to the claim that Terry M.'s father and grandfather had been members of one tribe, the Cherokee Nation. Respondent had previously contacted the BIA, but only regarding Dominic's *paternal* grandfather's suggestion that his deceased wife might have been of Cherokee heritage, discussed further below. However, there is no information contained in the record suggesting that Dominic's *maternal* relatives might have been members in any other tribe. Accordingly, the information obtained by respondent regarding Dominic's maternal heritage triggered the requirement that respondent send notice to the Cherokee Nation only. Although respondent had sent information to the BIA regarding Dominic's maternal heritage that resulted in the BIA's March 3, 2004 response, we find nothing in the facts or the law that required respondent to continue this correspondence.

Mother further contends that respondent was obligated to provide more information about her uncle, who purported was a member of the Cherokee Nation, to the Cherokee Nation and the BIA. Mother quotes *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995 (*Gerardo*), for the laudatory proposition that "[t]he opportunity for a tribe or the BIA to investigate means little if the department does not provide the available Indian heritage information it possesses." However, mother neglects to note that the court in *Gerardo* also rejected a contention that a social services department erred by failing to

make certain inquiries of relatives because it was speculative, since the record was silent as to whether or not the department made such inquiries. (*Id*. at p. 995.) Similarly, the record here is silent as to whether respondent sought more information about the uncle or knew anything more about him. Indeed, mother's own appellate brief, rather than state any additional information, argues only that the information should have been provided "*if known*." (Italics added.) Under these circumstances, mother's contention is without merit.

Finally, we briefly note that the court's finding that ICWA did not apply to Dominic indicates the court found no notice was required as a result of Dominic's *paternal* grandfather's statement in January 2004 that his deceased wife "may have been part Cherokee," which caused respondent to serve notice to the BIA. Mother states in her appellate reply brief that "whether the child's Indian heritage is from his father or mother is irrelevant to this appeal" and that she "does not dispute" that "the proper agency to receive notice was the Cherokee Nation," and that "[t]he real issue is that the Cherokee Nation never received proper notice." Given mother's failure to raise on appeal any additional notice issues relating to the paternal grandfather's statements, we will not further address the court's finding regarding the paternal grandfather's statement, or mother's argument that respondent should have notified the other Cherokee tribes initially, rather than just the BIA.

DISPOSITION

We follow the disposition outlined in *In re Gerardo A., supra*, 119 Cal.App.4th at page 997, and reverse the juvenile court's order terminating mother's parental rights. On remand, the juvenile court is directed to vacate its prior ruling that ICWA did not apply to Dominic and conduct further proceedings consistent with the views expressed in this opinion. If the court determines (1) that respondent has properly served the available Indian heritage information it possesses regarding Dominic via proper notices to any and all of the Indian tribes and/or the BIA as required by ICWA and rule 1439, and (2) that no tribe claims that Dominic is an "Indian child" under ICWA, the court shall reinstate its

order terminating mother's parental rights. Alternatively, the court shall proceed in this matter pursuant to the terms of ICWA.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Ruvolo, J.